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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

NEW YORK STATE BOARD OF LAW EXAMINERS, JAMES T. FULLER, JOHN E. HOLT-HARRIS, JR., RICHARD J. BARTLETT, LAURA TAYLOR SWAIN, CHARLES T. BEECHING, JR. and IRA P. SLOANE,

Petitioners,

v.

MARILYN J. BARTLETT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL CONFERENCE OF BAR EXAMINERS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

This case involves the decision of a state licensing board to deny testing accommodations requested by a prospective examinee. The board's decision was based upon an evaluation of the examinee's disability documentation by a third-party expert. Three questions are presented in the Petition for a Writ of Certiorari. This *amicus* brief, however, addresses only the second question presented by the Petitioners.*

The question addressed here is whether, in conflict with decisions of the Fifth, Eighth, Ninth and Eleventh Circuits, the Court of Appeals for the Second Circuit erred in concluding that a defendant can be held liable for compensatory damages under Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, absent a finding of bad faith, discriminatory animus, gross misjudgment, or knowledge of improper conduct.

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* The third question addressed in the Petition relates to the scope of the Rehabilitation Act, which applies to recipients of "federal financial assistance." Although not addressed in this brief, that question appears to implicate the Court's recent decision in *National Collegiate Athletic Ass'n v. Smith*, 67 U.S.L.W. 4130 (Feb. 23, 1999), decided after the filing of the Petition in this case.

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INTEREST OF *AMICUS CURIAE*

With the written consent of all parties, the National Conference of Bar Examiners ("NCBE") respectfully submits this brief as *amicus curiae* in support of the Petition for a Writ of Certiorari.[1]

Founded in 1931, the NCBE is an independent, non-profit corporation whose broad purpose is to assist in the process by which individuals are admitted to practice law in the various states and the District of Columbia. In furtherance of this purpose, the NCBE provides development, research and support services to boards or committees of bar examiners (referred to herein as "Boards") who regulate the bar admissions in their respective jurisdictions.

Of relevance here, the NCBE provides high quality standardized examinations that jurisdictions can use as part of their bar examination process. The most widely used examination developed by the NCBE is the Multistate Bar Examination ("MBE"), a multiple choice examination currently used in 52 jurisdictions, including New York. The NCBE also develops the Multistate Essay Examination ("MEE") (used in 13 jurisdictions), the Multistate Professional Responsibility Examination ("MPRE") (used in 52 jurisdictions), and the Multistate Performance Test ("MPT") (used in 18 jurisdictions). With the exception of the MPRE, which the NCBE administers, these examinations are administered by the Boards in each of the user jurisdictions.

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1. NCBE's counsel hereby confirm that they wholly authored this brief and that no person or entity other than the NCBE has made any monetary contribution to the brief's preparation or submission.

Title III of the Americans with Disabilities Act (the "ADA") requires, in relevant part, that any

> person that offers examinations or courses related to applications, licensing, certification or credentialing for secondary or post-secondary education, professional, or trade purposes shall offer such examinations in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.

42 U.S.C. § 12189. Title III thus applies to the NCBE.

Title II of the ADA prohibits "public entities" from discriminating against disabled individuals with respect to the public entities' services, programs and activities. 42 U.S.C. § 12132. Title II thus applies to the New York State Board of Law Examiners (the "New York Board" or the "Board"). If a Board receives federal financial assistance, it might also be subject to Section 504 of the Rehabilitation Act, which prohibits disability discrimination by recipients of such financial assistance. 29 U.S.C. § 794.[2]

The ADA was modeled after Section 504 of the Rehabilitation Act. The relevant standards for determining whether disability discrimination has occurred are essentially the same under both statutes. *See* 42 U.S.C. § 12133; *Bragdon v. Abbott*, 524 U.S. 624, 118 S. Ct. 2196, 2202 (1998).

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2. The NCBE is not governed by Title II of the ADA because it is a private corporation. It is not governed by the Rehabilitation Act because it does not receive federal financial assistance.

In 1998, the NCBE administered the MPRE to 68,232 bar applicants. The NCBE provided disability-related accommodations to 531 of those applicants, 299 of whom had cognitive/mental impairments. The NCBE thus has a significant interest in how the ADA is interpreted and applied with respect to bar examinations. This interest is direct in the case of the MPRE, which the NCBE administers, and indirect, but no less substantial, in the case of the MBE and the other NCBE examinations which Boards administer in user jurisdictions.

In the present case, the United States Court of Appeals for the Second Circuit held, among other things, that even if a testing agency hires an acknowledged expert and uses reasonable and acceptable methods for determining, in good faith, whether an individual examinee has a learning disability requiring testing accommodations, the testing agency can still be held liable for intentional discrimination, and therefore compensatory damages, if a court later determines, based on conflicting expert testimony, that the examinee did, in fact, have a learning disability. App. 19a-20a. The Second Circuit's standard for intentional discrimination conflicts with decisions of the Fifth, Eighth, Ninth and Eleventh Circuits and creates the equivalent of strict liability for violations of the federal disability laws. It places state boards of bar examiners and testing organizations such as the NCBE in an untenable position, while doing little or nothing to further the purposes of the federal disability statutes.

During the years 1992 through 1993, the New York Board received 109 requests for testing accommodations from individuals who stated that they have learning disabilities. The Board granted 84 of those requests and denied 25, one of which was Ms. Bartlett's. The possibility of even a handful

of those 25 denials resulting in litigation, despite the Board's best efforts both to comply faithfully with federal law and to maintain the integrity of its examinations, is a very disturbing prospect. Moreover, New York is but one jurisdiction, and the numbers referenced above relate to only a two-year period. Other jurisdictions are in a similar position. The Second Circuit's opinion therefore significantly increases the risk of litigation for all jurisdictions if they deny accommodations.[3] It also creates conflicting standards among the circuits. Given the importance of the issue to state licensing boards such as the New York Board, and to testing organizations such as the NCBE, the NCBE respectfully presents its views to the Court.

FACTS

The New York Board denied Ms. Bartlett's request for testing accommodations on the July 1993 bar examination only after reviewing, in good faith, the documentation that she provided in support of her request, and only after obtaining the advice of an independent expert consultant on learning disabilities, Dr. Frank Vellutino. App. 35a. As the district court acknowledged, Dr. Vellutino is a "research psychologist expert in the field of learning disabilities." App. 52a. He has "published numerous books and articles on the subject," he is a Professor in the Department of Educational Psychology and Statistics at the State University of New York at Albany, and he "supervises a clinic engaged in the

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3. *Cf. Hoover v. Ronwin*, 466 U.S. 558, 580-81 n.34 (1984) (noting, in a Sherman Act case, the untoward "discovery and litigation burdens" that would result for bar "examining boards and committees" if the lower court's decision were to be affirmed, and stating that, "every year, there are thousands of aspirants who, like Ronwin, are disappointed" when they fail a bar examination).

identification and treatment of children with dyslexia." *Id.* Dr. Vellutino utilized a method of evaluating an applicant's need for accommodation that was purposefully overinclusive in identifying those individuals with learning disabilities. App. 55a. Based on his methodology, he concluded that Ms. Bartlett was not an individual who needed testing accommodations. App. 56a.

After her initial request for testing accommodations was denied, Ms. Bartlett asked the Board to reconsider, and she submitted additional documentation. App. 35a. The Board considered the new documentation and also forwarded it to Dr. Vellutino. Based upon his evaluation, the Board denied Ms. Bartlett's appeal. App. 35a-36a. Ms. Bartlett then commenced the instant action in the United States District Court for the Southern District of New York claiming, among other things, that the Board's denial of her request for accommodations in taking the bar examination violated Title II of the ADA and Section 504 of the Rehabilitation Act. App. 24a.

A score of 660 is needed to pass the New York bar examination. App. 27a-28a. Ms. Bartlett has taken (and failed) the New York bar examination five times, achieving scores between 563 and 615. App. 33a, 35a, 36a. Ms. Bartlett was not provided with any testing accommodations the first four times that she took the New York examination (she did not request any accommodations on at least one of the examinations, and perhaps two). App. 33a-35a. On her fifth try, however, Ms. Bartlett was given testing accommodations pursuant to a stipulated preliminary injunction entered in this case. App. 36a. She again failed, achieving a lower score (597) than she had achieved on the February 1993 examination without accommodations (615). App. 35a-36a.

Ms. Bartlett also took the Pennsylvania bar examination in July 1993. App. 37a. Although she was provided testing accommodations, she also failed this examination. *Id.*

Despite her poor performance on the two bar examinations administered to her with special accommodations, Ms. Bartlett persisted in her claims against the Board and her lawsuit proceeded to trial. After a three week trial which included conflicting expert testimony and "exhibits and briefs aggregating to more than 5000 pages," the district court concluded that the Board violated the ADA and the Rehabilitation Act. App. 24a, 58a. In analyzing Ms. Bartlett's Equal Protection Claim and the individual defendants' claim of qualified immunity, however, the district court concluded that

> the Board's procedures, including the subjection of applicants' reports to review by an expert, are rationally related to the legitimate government end of discerning whom should be afforded accommodations on the state bar examination.

App. 110a; *see also* App. 112a ("Clearly, . . . it is not irrational for the Board to use an expert to assist in the evaluation of [an applicant's] reports. Likewise, the choice of Dr. Vellutino as that expert was perfectly rational, as were Dr. Vellutino's theories."). The district court further found that: (1) the Board and its expert employed a reasonable methodology to determine whether Bartlett was learning disabled; (2) the individual defendants acted reasonably "when they determined that plaintiff was not disabled under the law;" (3) "a reasonable defendant would not have understood that his or her acts were unlawful;" (4) "[d]efendants seemingly made an attempt to comply with the

statutes;" and (5) that any resulting bias against learning disabled applicants generally, or the plaintiff specifically, was unintentional. App. 109a, 111a-112a, 132a-133a. Nonetheless, the district court held that the Board had committed an ***intentional*** violation of the ADA and the Rehabilitation Act, and it awarded Ms. Bartlett $12,500 in compensatory damages. App. 140a-141a.

On appeal, the Second Circuit concluded that the Board's decision was entitled to no deference. App. 9a-11a. It affirmed the award of damages but remanded the case for a final determination of the amount. App. 19a-20a. Acknowledging that an award of compensatory damages requires a finding of intentional discrimination, the Second Circuit went on to hold that "intentional discrimination against the disabled does not require personal animosity or ill will. . . ." App. 19a-20a. Rather, the Second Circuit concluded, intentional discrimination "may be inferred when a policymaker acted with at least deliberate indifference to the strong likelihood that a violation of federally protected rights will result from the implementation of the [challenged] policy." App. 20a (quotations and citations omitted). Discounting (if not ignoring) the district court's findings regarding the reasonableness and good faith of the Board's actions, the Second Circuit concluded that because the trial court ultimately found that the Board's methodology for identifying individuals with learning disabilities was flawed, the Board's denials of Ms. Bartlett's accommodation requests amounted to "intentional discrimination." App. 20a. This petition follows.

REASONS FOR GRANTING THE WRIT

This case creates a conflict among the circuits regarding the correct standard for an award of compensatory damages under Title II of the ADA and the Rehabilitation Act. In the Fifth, Eighth, Ninth and Eleventh Circuits, a plaintiff cannot recover compensatory damages under Title II of the ADA or under the Rehabilitation Act absent a finding of bad faith, gross misjudgment, or discriminatory animus, or a knowing failure to correct improper discrimination. Deviating from these decisions, the Second Circuit effectively held in this case that a defendant will be liable for compensatory damages under Title II of the ADA or the Rehabilitation Act, regardless of the reasonableness or good faith of its actions or the lack of any discriminatory animus, so long as the defendant knowingly acted in a manner that is ultimately found, at trial, to violate the statutes. Because of the importance of this issue to individuals and entities which, every year, must make good faith judgments about the disabilities of thousands of individuals and their need for accommodation, the Court should grant certiorari to resolve this conflict.

I.

THE ISSUE HAS WIDESPREAD SIGNIFICANCE.

While the present case involves one individual who took one kind of examination, the issues raised in the New York Board's petition have far broader implications. Hundreds of thousands of examinations are administered each year by or for a broad range of state licensing or certification boards. Individuals who want to become lawyers, doctors, nurses, engineers, social workers, dentists, accountants, or architects, for example, must obtain licenses before they can lawfully practice, and the licensing process for all of those professions

requires completion of one or more examinations. Likewise, in the educational context, hundreds of thousands of individuals take admissions examinations every year, such as the SAT or the ACT Assessment; the Law School Admissions Test ("LSAT"); the Medical College Admissions Test ("MCAT"); and the Graduate Record Exam ("GRE").

In both contexts, professional licensing and admissions to educational institutions, as well as in other contexts in which examinations are used, thousands of test takers request testing accommodations each year based upon claimed disabilities. Most of the requests are properly documented, and most accommodations are routinely provided.

The ADA and the Rehabilitation Act define the term "disability" in terms of "physical" and "mental" impairments. *See* 29 U.S.C. § 705(20); 42 U.S.C. § 12102(2). Relatively speaking, accommodation requests involving physical impairments have not been difficult to evaluate or particularly controversial. But an increasingly large number of testing accommodation requests involve mental impairments, such as dyslexia, attention deficit disorders, dyscalcula, the "disorder of written expression," other learning or cognitive disabilities, and even "test anxiety."[4] These requests generally

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4. Between 1990 and 1993, for example, the number of learning disabled individuals taking the LSAT under special conditions (usually consisting of time extensions) increased by over 100 percent, from 261 to 553. In the 1994-95 testing year, [there were] 785 requests from learning disabled individuals for similar accommodations.

L. Eichhorn, "Reasonable Accommodations and Awkward Compromises: Issues Concerning Learning Disabled Students and Professional Schools in the Law School Context," 26 J. of Law & Educ. 31 (1997).

pose greater challenges, both in terms of properly documenting the disability and determining what accommodations are appropriate. The accommodations requested for mental disabilities include extended testing time; readers; scribes; calculators; changed testing formats (*e.g.*, essay rather than multiple choice); additional rest periods; separate testing rooms; a change in the grading process; and, in at least one case, modification of standardized exam questions so they are more "simple" and "direct."[5]

"Diploma tests and licensure tests are designed to protect the public from those who have not mastered minimum skills." S.E. Phillips, "High Stakes Testings Accommodations: Validity Versus Disabled Rights," *Applied Measurement in Education*, 7(2), 93-120 at 98 (1994). When a given test taker asks for testing accommodations that are not available to other test takers, the question arises whether "scores with and without accommodations are comparable. That is, do scores from nonstandard administrations have the same meaning as scores from standard administrations?" *Id.* at 96; *see also Standards for Educational and Psychological Testing* at 78 (1991 ed.) (published by the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education). A request for accommodations

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5. *See* Petition for Damages and Injunctive Relief ¶ 6, *Jones v. American Council on Educ.*, No. 98-592-A-M2 (M.D. La.) (filed June 30, 1998) (ADA suit brought by an individual who claimed to suffer from "attention deficit, dyslexia, dysgraphia, discalcula, a short attention span and inability to process sequential information and instructions;" the individual was provided some but not all of his requested accommodations when he took the General Educational Development tests, the successful completion of which is recognized in certain states as the equivalent of a high school diploma).

thus raises fairness issues not only for the individual who has requested the accommodations, but also for the many individuals and entities who rely upon the validity of the examination as an accurate measure of what it is designed to assess.[6] It also raises fairness issues for other test takers who do not get such accommodations and who might suffer a tangible loss — such as admission to a college or to a state's bar — if the accommodated individual obtains an inappropriate advantage by virtue of the accommodations.

For these reasons, licensing boards and testing organizations have a responsibility to ensure that testing accommodations are provided to all individuals with qualifying disabilities, but not to individuals who do not have, or do not properly document, such disabilities. Necessarily and appropriately, they must balance competing interests. This is especially true in the licensing context, where the decision regarding the appropriateness of testing accommodations is made for purposes of protecting the

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6. *See generally* Note, "Toward Reasonable Equality: Accommodating Learning Disabilities Under the Americans with Disabilities Act," 111 Harv. L. Rev. 1560, 1562, 1573 (1998) (arguing that "decisional models that focus on balancing the interests of individuals and institutions . . . are most consistent with the ADA's vision of reasonable equality," and noting that "many experts in the field recognize the problematic nature of the LD category — a broadly heterogenous classification with disputed etiology. . . ."); Note, "Learning and Mental Disability Protection Under the Americans with Disabilities Act in the Quest for Certification for the Practice of Law," 10 J. Law & Health 209, 227-28 (1995/1996) (noting the potential for conflict between a disabled individual's request for accommodations and the "vital function of the certification process — to screen applicants for competency and fitness to practice law," and stating that ADA challenges are "shift[ing] the focus to fear of litigation").

public, not for self-interested reasons. *See, e.g.*, *Theriault v. Flynn*, 162 F.3d 46, 50 (1st Cir. 1998); *Jacobsen v. Tillman*, 17 F. Supp. 2d 1018, 1024 (D. Minn. 1998); *Price v. National Bd. of Medical Examiners*, 966 F. Supp. 419, 421-22 (S.D. W.Va. 1997); *Ramachandar v. Sobol*, 838 F. Supp. 100, 108 (S.D.N.Y. 1993).

The present case involves New York's licensing process for lawyers. This Court has recognized that "important state interests" are implicated by a state's regulation of "persons who are authorized to practice law." *Middlesex County Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423, 431-34 (1982). The issue presented here has significant implications with regard to those state interests and deserves consideration by the Court.

II.

THE SECOND CIRCUIT'S STANDARD FOR IMPOSING COMPENSATORY DAMAGES CONFLICTS WITH DECISIONS FROM THE FIFTH, EIGHTH, NINTH AND ELEVENTH CIRCUITS.

An award of compensatory damages under Title II of the ADA and Section 504 of the Rehabilitation Act requires a finding of "intentional discrimination." *Guardians Ass'n v. Civil Serv. Comm'n of New York*, 463 U.S. 582 (1983) (Title VI of the Civil Rights Act of 1964 — whose remedial scheme is adopted under Title II of the ADA and under the Rehabilitation Act — requires a finding of intentional discrimination before compensatory damages may be awarded). While the Second Circuit referenced this requirement, its holding as to what conduct suffices to support

a finding of "intentional discrimination" conflicts with decisions from at least four other Circuits.

In *Marvin H. v. Austin Indep. Sch. Dist.*, 714 F.2d 1348, 1356 (5th Cir. 1983), the Fifth Circuit held that

> when a school district, in good faith attempts to provide a free appropriate public education to a handicapped child and has adequately complied with the procedures for determining the child's correct educational placement, it will not later stand liable to the parents for damages even if a court subsequently determines that the educational placement was incorrect.

Later, in *Carter v. Orleans Parish Pub. Schs.*, 725 F.2d 261, 264 (5th Cir. 1984), the Fifth Circuit emphasized that absent some allegation that the defendant school board "intended to place his children in inappropriate classes or that his children's placement manifested discriminatory animus," damages for a violation of Section 504 of the Rehabilitation Act would not lie.

In *Monahan v. State of Nebraska*, 687 F.2d 1164, 1171 (8th Cir. 1982), *cert. denied*, 460 U.S. 1012 (1983), the Eighth Circuit held, in the context of education of disabled children, that "either bad faith or gross misjudgment" must be shown in order to impose liability under Section 504 of the Rehabilitation Act. The court of appeals reasoned that the reference in the Rehabilitation Act "to 'discrimination' must require . . . something more than an incorrect evaluation, or a substantively faulty individualized education plan, in order for liability to exist." *Id.* at 1170. The Eighth Circuit extended this ruling to Title II of the ADA in *Hoekstra v. Independent*

Sch. Dist. No. 283, 103 F.3d 624, 626-27 (8th Cir. 1996), *cert. denied*, 520 U.S. 1244 (1997). "[I]n the context of educational services for disabled children," the Eighth Circuit concluded in *Hoekstra* that "a showing of gross misjudgment or bad faith . . . is necessary to [recover monetary damages] on an ADA claim." *Id.* at 627; *accord Sellers v. School Bd. of City of Manasas, Va.*, 141 F.3d 524, 529 (4th Cir.), *cert. denied*, 119 S. Ct. 168 (1998).

In *Ferguson v. City of Phoenix*, 157 F.3d 668, 675-76 (9th Cir. 1998), the Ninth Circuit held that regardless of whether an award of compensatory damages under Section 504 and Title II of the ADA requires a showing of "deliberate indifference" or "discriminatory animus," the plaintiffs failed to show that the City's conduct rose to either standard. In *Ferguson*, the court held that the City's failure to correct its 9-1-1 services for the hearing impaired "appear[ed] to be no more than at times some not uncommon bureaucratic inertia as well as some lack of knowledge about DOJ's Manual's requirements." *Id.* at 675. The court noted that there was no

> actual showing of inadequate training and nothing to put the City on notice of any inadequacy. Further, . . . there was an internal investigation into the level of [the City's] 9-1-1 service followed by diligent effort . . . to upgrade its services.

Id. at 675-76. In short, the court concluded, there was simply no showing of "bad faith on the part of the City." *Id.* at 675-76; *see also Memmer v. Marin County Courts*, __ F.3d __, 1999 U.S. App. LEXIS 3333, *9-*12 (9th Cir. March 3, 1999) (rejecting a visually impaired individual's damage claim under Title II of the ADA because there was "no evidence of the discriminatory intent necessary . . to recover monetary damages").

Finally, in *Wood v. President & Trustees of Spring Hill College*, 978 F.2d 1214, 1219 (11th Cir. 1992), the Eleventh Circuit found no error in the district court's jury instructions informing the jury that an award of damages under Section 504 required the plaintiff to prove that her "constructive dismissal" from the defendant college due to its alleged hostility to her schizophrenia "was the result of intentional discrimination or discriminatory animus." Elaborating, the court of appeals held that, under either standard, "[a]s a general matter, good faith attempts to pursue legitimate ends are not sufficient to support an award of compensatory damages under section 504." In *Wood*, the jury returned a verdict in favor of defendant.

The above cases stand in stark contrast to the Second Circuit's decision here. Like the defendants in *Marvin H.*, *Hoekstra*, *Ferguson*, *Memmer* and *Wood*, the Board was found to have acted reasonably. The Board hired a noted expert and attempted to comply with Section 504 and the ADA's requirements, finding out only after a long and complicated factual trial that its conclusions with respect to the plaintiff were — in the court's view — legally deficient. To our knowledge, only the Second Circuit holds such conduct to amount to "deliberate indifference" and, therefore, to constitute "intentional discrimination."

One cannot reasonably conclude that the Board intentionally violated the ADA by denying Ms. Bartlett's request for accommodations. Under the ADA, it is permissible for

> organizations that administer tests . . . to require individuals with disabilities to provide . . . appropriate documentation . . . of their disabilities

> and of any modifications or aids that would be required,

so long as the documentation requirements are not "unreasonable." 28 C.F.R. Part 36, App. B at 643 (1997); *see also Kaltenberger v. Ohio College of Podiatric Medicine*, 162 F.3d 432, 437 (6th Cir. 1998). If the documentation requested by a Board is reasonable, the Board has not violated the ADA in requesting the documentation. By an extension of this reasoning, a Board does not violate the ADA in its evaluation of an applicant's documentation so long as the Board acts reasonably in reviewing the documentation and reaching its decision. The New York Board unquestionably met that standard here.

The New York Board requested appropriate documentation in this case and then considered everything that Ms. Bartlett submitted. The documentation was reviewed not only by the Board, but also by an independent expert on learning disabilities, Dr. Frank Vellutino. The district court concluded that the Board acted reasonably in reviewing the documentation, in selecting Dr. Vellutino as its expert consultant, ***and*** in concluding that Ms. Bartlett does not have a learning disability that would entitle her to testing accommodations. App. 109a, 111a-112a, 132a-133a.

This should have been the end of the court's analysis. Having concluded that the Board acted reasonably and rationally not only in its consideration of Ms. Bartlett's request for accommodations, but also in the conclusion that it reached, the district court should have entered judgment in the Board's favor. The Board's decision was entitled to

deference.[7] But even if no deference is given to the Board's decision, the Board clearly should not have been subjected to an award of compensatory damages based upon a finding of intentional discrimination.

If left standing, the decision below will inevitably compel many licensing boards and testing agencies to accept any documented claim of disability, no matter how tenuous the documentation, lest they face the risk of liability. Licensing boards and testing organizations evaluate accommodation requests from thousands of individuals every year. It is imperative that these entities understand what is required of them under the disability laws, that these standards be uniform, and that monetary sanctions not attend reasonable and good faith decisions regarding the existence of a qualifying disability or the appropriateness of a particular accommodation. This Court's intervention is therefore needed to create uniform standards of liability and to inform regulated parties what conduct will result in a damages award under Section 504 and the ADA.

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7. *See, e.g.*, *Garro v. State of Connecticut*, 23 F.3d 734, 736 (2d Cir. 1994); *Jacobsen v. Tillmann*, 17 F. Supp. 2d 1018, 1024-25 (D. Minn. 1998); *cf. Zukle v. Regents of the Univ. of California*, __ F.3d __, 1999 U.S. App. LEXIS 2702, *16-*22 (9th Cir. 1999) (holding that, under the ADA and Rehabilitation Act, the decisions of an educational institution regarding the appropriateness of requested accommodations are "entitled to deference") (citing *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 225 (1985); *Wynne v. Tufts Univ. Sch. of Medicine*, 976 F.2d 791, 795 (1st Cir. 1992), *cert. denied*, 507 U.S. 1030 (1994); *McGregor v. Louisiana State Univ.*, 3 F.3d 850, 859 (5th Cir. 1993), *cert. denied*, 510 U.S. 1131 (1994); *and Doe v. New York Univ.*, 666 F.2d 761, 776 (2d Cir. 1981)); *Kaltenberger v. Ohio College of Podiatric Medicine*, 162 F.3d 432, 436 (6th Cir. 1998) (same).

CONCLUSION

The New York Board's petition for a writ of certiorari should be granted, preferably to address all issues raised in the Petition, but at a minimum to resolve the conflict in the Circuits regarding the appropriate standard for awarding compensatory damages under Title II of the ADA and Section 504 of the Rehabilitation Act.

Respectfully submitted,

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